PUBLIC PROSECUTOR v. ANG BOON FOO

[O.C.J. (Gunn Chit Tuan J.) July 2 and 5, 1979]

[Penang — Criminal Trial No. 19 of 1977]

Dangerous Drugs — Accused charged with possession of 3029 gms of heroin and 184.28 gms of morphine — "Possession" — "Control" — "Custody" — "Power of disposal" — Meaning of — Dangerous Drugs Ordinance, 1952, s. 37(d).

Evidence — Burden of proof — Balance of probabilities to rebut presumption under Dangerous Drugs Ordinance, 1952, s. 37(d).

The accused in this case was alone in the house when the police raided it on January 20, 1977. 3029 gms of heroin and 184.28 gms of morphine were found in packages lying on the floor of his bedroom. He was originally charged by the prosecution for an offence of trafficking in dangerous drugs on the relevant date under section 39B(1)(a) of the Dangerous Drugs Ordinance, 1952. The charge was later amended to one of possession of dangerous drugs. The accused pleaded not guilty to the amended charge.

In his defence, the accused told the court that he left his house at about 3.00 p.m. on the day in question for his night-club at Butterworth. As he was checking his stocks there, two Europeans, who were his customers, came to look for him. One of them, known as Mark Philips, told him that he wanted to meet a friend at the accused's residence. Thereupon. the three left for the residence. Whilst they were in his house a male Chinese arrived there on a motor-cycle. The two Europeans went out to meet him. The accused saw the male Chinese hand over two packets of article to Mark Philips who brought them into his house. The two Europeans then left the house leaving the packages in his room. Subsequently, the premises was raided by the police. The accused denied that he knew that the packages contained heroin.

Held: (1) in a case such as this, where the burden has shifted on to an accused to rebut a presumption under section 37(d) of the Dangerous Drugs Ordinance, 1952, the burden can also be said to be discharged by merely showing on the balance of probabilities that he did not have possession and did not know the nature of the drugs;

(2) if the accused could show, on the balance of probabilities that although he had something in his custody or under his control yet he did not have the power of disposal, then, he would have rebutted the presumption under section 37(d) of the Dangerous Drugs Ordinance, 1952, and would have shown that his custody or control of the things concerned did not in the circumstances amount to possession under the said Ordinance;

(3) in this case, although the accused had custody or control over the packages concerned at the time the police officers raided his house, he did not have the power of disposal over the said packages in the sense of being able to deal with them in the circumstances as owner to the exclusion of all others including the said two Europeans.

[Editorial Note: An appeal to the Federal Court by the Public Prosecutor was filed on July 11, 1979 but Notice of Withdrawal was filed by him on July 18, 1980.]

Cases referred to:-

(1) *Lim Sing Hiaw* v. *Public Prosecutor* [1965] 1 M.L.J. 85, 86.

(2) *Public Prosecutor* v. *Heng You Nang* [1949] M.L.J. 285, 287.

(3) *Toh Ah Loh & Anor.* v. *R.* [1949] M.L.J. 54.

(4) *Leow Nghee Lim* v. *R.* [1956] M.L.J. 28, 29, 30, 32.

(5) *R.* v. *Sleep* (1861) 8 Cox C.C. 472, Le & Ca 44, 57.

(6) *Neo Koon Cheo* v. *R.* [1959] M.L.J. 47.

(7) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.

(8) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237, 238.

(9) *Johnston Fear and Kingham* v. *Commonwealth* 67 C.L.R. 314.

(10) *Bank of New South Wales* v. *Commonwealth* 76 C.L.R. 1.

(11) *Dollfus Mieg et Cie* v. *Bank of England* [1950] Ch. 333.

CRIMINAL TRIAL.

Jag-Jit Singh and *C.V. Prabhakaran* for the accused.

Hashim bin Datuk Haji Yusoff (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Gunn Chit Tuan J.: The facts of this case are simple. When a police party raided house No. 4504-E, Jalan Permatang Pauh, Butterworth, on the 20th day of January, 1977, the accused was alone in the house and 3029.00 grammes of heroin and 184.28 grammes of morphine were found in packages lying on the floor of his bedroom. He was originally charged by the prosecution for an offence of trafficking in dangerous drugs on the relevant date under section 39B(1)(a) of the Dangerous Drugs Ordinance, 1952. But after hearing and recording the evidence adduced by the prosecution, I pointed out to the learned deputy public prosecutor that the new statutory presumption under section 37(da) of the said Dangerous Drugs Ordinance, 1952, as well as the new definition of "trafficking" therein were not applicable in this case as they only came into force w.e.f. March 18, 1977 when the said Ordinance was amended by Act A 390/77. After the learned deputy had referred to the case of *Lim Sing Hiaw* v. *Public Prosecutor,*[1] I also stopped him from labouring with his argument that the said amendments dealt only with the mode of trial and being purely procedural were retrospective in their effect. Thereafter, the learned deputy stated that if the court held that the amended definition of "trafficking" as well as the said new statutory presumption did not apply, then the charge against the accused should be amended to one of possession of dangerous drugs. The learned deputy then referred to the judgment of Spenser Wilkinson J. (as he then was) in the case of *Public Prosecutor* v. *Heng You Nang*[2] and quite correctly applied to the court to exercise its powers under section 158 of the Criminal Procedure Code (F.M.S. Cap. 6) to alter the charge against the accused. The two learned counsel for the accused did not at that stage seriously contend that there was no 'prima facie' case at all against the accused and agreed that the charge had to be amended. At that stage I read the draft of an amended charge suggested by the learned deputy and the charge against the accused was therefore amended to read as follows:—

"That you on the 20th day of January, 1977, at about 6.40 p.m. at premises No. 4504-E, Jalan Ptg. Pauh, in the District of Butterworth, in the State of Penang, not being a person authorised or deemed to be so authorised under the Dangerous Drugs Ordinance 1952, did have in your possession dangerous drugs, to wit, heroin weighing 3029.00 grammes and morphine weighing 184.28 grammes in contravention of section 12(2) of the Dangerous Drugs Ordinance, 1952, and that you have thereby committed an offence punishable under section 12(3) of the Dangerous Drugs Ordinance 1952 read with section 39A of the said Ordinance."

Neither the learned deputy nor either of the two learned counsel for the accused objected to the charge as altered above. I then called upon the accused to enter upon his defence on the amended charge which was then read and explained to him. Having consulted his two counsel, the accused pleaded not guilty to the amended charge and after the three alternatives had been explained to him, he elected to give evidence on oath.

In his defence, the accused told the court on oath that he left his house at about 3.00 p.m. on the day in question for his night club at Bagan Ajam, Butterworth. As he was checking his stocks there, two Europeans, who were his customers, came to look for him. One was known as Mark Philips and the other was called Willie. He had known them since November 1976 and they had frequented his night club. At about 6.00 p.m. that day, Mark Philips told him that he wanted to meet a friend at his residence in Permatang Pauh. After that he and the two Europeans left the night club for his house. Whilst they were in his house a male Chinese arrived there on a motor-cycle. That male Chinese stopped in front of his house on the roadside and the two Europeans went out to meet him. He then saw that male Chinese hand over two packets of articles to Mark Philips who brought them into his house. Mark Philips told him that he wanted to leave them in his house temporarily and he told the former to leave those things in his room near the door. After leaving the packages in his room, the two Europeans left his house. Then, some persons, who turned out to be police officers, rushed into his house and found the packages on the floor of his bedroom. He was questioned by the police and told them that the packages belonged to two Europeans who had just left his house. He was arrested and brought to Penang with the packages. He denied that he knew that the packages contained heroin.

Under cross-examination, the accused said that Mark Philips was tall and sported a beard and a moustache, whilst Willie was shorter and clean shaven. He denied that the two Europeans had arranged previously to meet him at his night club that day and said that he too did not ask Mark Philips why he wanted to meet his friend at his house. When challenged he said he did not know the contents of the packages and that was why he allowed the two Europeans to leave them in his house. He also denied that he had concealed them in his bedroom, the door of which was not closed.

The defence called four other witnesses. Two of them (DW3 and DW4), the accused's neighbours, told the court that they were on that day at about 6.15 p.m. to 6.30 p.m. in front of their houses, which are in the same row of terrace houses as the accused's house, when they saw a blue car stop in front of the accused's house. They both saw the accused and two Europeans get out of the car and then enter the accused's house. Later they also saw a male Chinese arrive on a motor-cycle and hand over two packages to the two Europeans who came out of the accused's house to receive them. The two Europeans walked back into the accused's house with the packages and left in their car later on. Then they also saw two or three male Malays and Chinese enter the accused's house. Those people left the accused's house later on and were accompanied by the accused who was in handcuffs. They also carried away the packages which were brought into the accused's house by the Europeans.

Another witness (DW2), a frequent visitor to the accused's house and who was in it that day also confirmed that he saw the accused return home with two Europeans. The last witness for the defence (DW5) was a court interpreter attached to the Magistrate's Court, Nibong Tebal. He was attached to the Butterworth Sessions Court prior to July 1, 1978 and has known the accused since 1972. That witness told the court that when he met the accused at his night club on Christmas Eve 1976 he was introduced to two Europeans and remembered that one of them was called Mark Philips and the other Willie. He confirmed that Mark Philips was well-built and tall and had a beard whereas the other European did not have a beard and was slightly shorter. Apart from the accused, all the other defence witnesses were not really seriously challenged during their cross-examination. I did not think that they were telling lies and accepted them as witnesses of truth.

In summing up his case, Mr. Jag-Jit Singh, the senior counsel for the accused, submitted that issues of fact were involved in this case. He pointed out that the accused had told the police everything at the first opportunity when he spoke to the raiding officer (PW1) and when he made his cautioned statement (exhibit D15) to Supt. William Lim (PW6) later that day. He also pointed out that the accused maintained in court what he had said in his cautioned statement. Counsel also stated that the story of the accused about the two Europeans was true and referred to the evidence of the defence witnesses DW2, 3 and 4 who had described the Europeans and confirmed the accused's evidence about them. Counsel also referred to the evidence of DW5 and said that that witness had no reason to lie and submitted that there was therefore no doubt about the existence of the two Europeans. Counsel then referred to the case of *Toh Ah Loh and Mak Thim* v. *Rex*[3] in which the former Singapore Court of Appeal had held, *inter alia*, "that possession in order to incriminate a person, must have the following characteristics: (a) the possessor must know the nature of the thing possessed, (b) the possessor must have in him a power of disposal over the thing and (c) the possessor must be conscious of his possession of the thing." Counsel submitted that on the facts the accused did not know the contents of the packages and that his credit had not been shaken in any way. Mr. Prabhakaran, the other counsel for the accused, having referred to the presumption in section 37(d) of the Dangerous Drugs Ordinance, 1952, then referred to the Singapore case of *Leow Nghee Lim* v. *Reg*[4] and submitted that control of the said packages was with the Europeans who had kept them in the accused's room, the door of which was not locked.

At this stage, I would pause to note that Taylor J. (as he then was) had, in the said case of *Leow Nghee Lim* v. *Reg*,[4] pointed out that the characteristics of "possession" stated in the said case of *Toh Ah Loh and Mak Thim* v. *Rex*[3] do not apply, without qualification, to the Dangerous Drugs Ordinance. In his judgment His Lordship said as follows:—

"There (in *Mak Thim's* case[3]) the court specified certain characteristics without which, they said, (except by statute) possession cannot be criminal. The words in brackets are vital. They were deliberately inserted to show that the ruling is not applicable where the meaning of the word 'possession' is controlled by the particular statute. Apart from this, every judgment must be read as applicable to the particular facts proved. General expressions are to be understood not in their apparently wide sense, as expositions of the whole law on the point, but governed and qualified by the facts of the particular case. Attempts have been made to construe the words of the

Drugs Ordinance by applying the dictum in *Mak Thim*[3] as though it were a definition by the Interpretation Ordinance. This is contrary both to the general principle and to the terms of the dictum itself, and likely to lead to confusion, . . ."

His Lordship then went on to expound the meaning of the word "possession". He referred to the old English case of *R.* v. *Sleep*[5] in which Willes J. had also discussed the concept of "possession" in the following words:—

"Possession does not consist merely in manual detention. Suppose I request a bystander to hold anything for me, it still remains in my possession. So also possession may be required or retained over goods which are in the manual detention of a third person."

Taylor J. observed further in the said *Leow Nghee Lim's* case[4] that: —

"The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him."

In the present case it could not be said and it was not seriously contended by defence counsel at the close of the case for the prosecution that the accused did not have in his custody or under his control the packages in question at the material time, and by virtue of the said presumption under section 37(d) of the Dangerous Drugs Ordinance, 1952, he was therefore, until the contrary is proved, deemed to have been in possession of the drugs in question, and also, until the contrary is proved, deemed to have known the nature of such drugs. (*Neo Koon Cheo* v. *R.*[6]). But it has also been ruled by the Privy Council in the case of *Public Prosecutor* v. *Yuvaraj*[7] that where an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved", the test is the same as that applied in civil proceedings: the balance of probabilities. Therefore in a case such as this where the burden has shifted on to an accused person to rebut such a presumption under section 37(d) of the Dangerous Drugs Ordinance, 1952, the burden can also be said to be discharged by merely showing on the balance of probabilities that he did not have possession and did not know the nature of the drugs.

Next it must be noted, as pointed out by Taylor J. in his judgment in the said case of *Leow Nghee Lim* v. *Reg*,[4] that there is no presumption of custody. The presumption is from custody. His Lordship had also explained the meaning of the word "custody" in the following words:—

"Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession."

His Lordship later observed in his said judgment that the distinction between custody and possession was as follows:

"The main distinction between custody and possession is that a custodian has not the *power of disposal* (italics supplied). The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions."

The ingredients necessary to make possession criminal were also discussed by Thomson J. in the case of *Chan Pean Leon* v. *Public Prosecutor*[8] in the following words: —

"Of course there can be no possession without knowledge and there can be no possession without some *power of disposal* (italics supplied) but an essential ingredient of all possession is that there must be an intention as owner in case of need to exercise that power to the exclusion of other persons."

In this case, the packages were found by the police on the floor of the accused's bedroom. Either they belonged to him in which case they were in his possession or they belonged to the Europeans who had kept them there and the accused merely had custody or control because he was taking care of them. From the evidence adduced I was satisfied and found that there were in fact two Europeans who were in the accused's house that day and who had not long before the arrival of the police officers received the packages concerned from a male Chinese and had left them in the care of the accused. As regards knowledge, the learned deputy had contended that any reasonable person should know and would have asked what the packages contained and it was indisputable that the accused was aware of the existence of the packages which he had allowed the two Europeans to leave on the floor of his bedroom; but I had some doubts, after hearing the accused's evidence, whether he knew the nature of the substance in those packets.

Returning to Mr. Prabhakaran's submission that control of the packages concerned was with the Europeans who had kept the packages in the accused's house, I would again with respect, agree with Taylor J's *dictum* in the said *Leow Nghee Lim's* case that "control must be proved as a fact and it must arise from the relation of the person to the goods, ..." In the circumstances of this case there could be no other finding of fact but that the accused did have control of the packages at the material time. However, I thought that there was perhaps some confusion in the mind of learned counsel for the accused between the expressions "power of control" or "control" and "power of disposal". As regards the word 'control' it was said in the Australian case of *Johnston Fear and Kingham* v. *Commonwealth*[9] that: —

"The word 'control' is wide enough to include many types of possession which are not commensurate with full ownership."

Another judge has also described the word 'control' in the Australian case of *Bank of New South Wales* v. *Commonwealth*[10] as follows: —

"An unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than 'restraint', something equivalent to 'regulation'."

But the court in the English case of *Dollfus Mieg et Cie* v. *Bank of England*[11] has said that the word 'control' "will cover the right to tell the possessor what is to be done" with property. In the circumstances of this case I considered that the accused had the right to tell the possessors, that is, the two Europeans to take the packages away from his house and he therefore also had control over the said packages.

As stated above, I had found as a fact that the package concerned were in the circumstances of this case in the custody or under the control of the accused at the relevant time and that was why he was deemed to have been in possession of them by virtue of the said statutory presumption under section 37(d) of the Dangerous Drugs Ordinance, 1952. But as pointed out by both Taylor J. and Thomson J. (as they then were), the feature which distinguishes possession from custody or control is the power of disposal. In a case such as this, if an accused person can show, on the balance of probabilities, that although he had something in his custody or under his control yet he did not have the power of disposal, then, in my judgment, he would have rebutted the presumption under the said section 37(d) of the Dangerous Drugs Ordinance, 1952, and would have shown that his custody or control of the things concerned did not in the circumstances amount to possession under the said Ordinance.

As far as I am aware, the expression "power of disposal" has not been examined in any written judgment. As regards the word "power" by itself I found in *Stroud's Judicial Dictionary* the following definition: —

"A power is an authority reserved by, or limited to, a person to dispose, either wholly or partially, of real or personal property, either for his own benefit or for that of others. The word is used as a technical term, and is distinct from the dominion which a man has over his own estate by virtue of ownership" (Farwell, 1).

But the word "power" alone, to use its ordinary dictionary meaning, simply means the ability to do something or anything and the said expression "power of disposal" which is not, in my opinion, used as technical words, was, I think, used by Taylor J. and Thomson J. (as they then were) in the abovementioned cases to mean the ability to deal with a movable thing as owner to the exclusion of others. There is therefore a power of disposal, and therefore possession in law where a person is so situated with respect to a movable thing, such as a dangerous drug in this case, if he has the power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he may be presumed to do so in case of need. Now on the evidence adduced in this case by the defence and accepted by me, I found that the packages concerned belonged to the two Europeans who had received them from a male Chinese that day and had asked the accused's permission to allow them to be kept in his house temporarily. In those particular circumstances I therefore found as a fact in this case that although the accused had custody or control over the packages concerned at the time the police officers raided his house, he did not have the power of disposal over the said packages in the sense of being able to deal with them in the circumstances as owner to the exclusion of all others including the said two Europeans. Or, in other words, to apply the observations made by Thomson J. (as he then was) in the said case of *Chan Pean Leon* v. *Public Prosecutor*[8] there was no *animus possidendi* that is, the intention as a matter of fact of dealing with the packages as if they belonged to him should he see any occasion to do so. As the evidence adduced by the defence in this case had, on the balance of probabilities, rebutted the said presumption under section 37(d) of the Dangerous Drugs Ordinance, 1952, I therefore found the accused not guilty of the offence of possession of dangerous drugs under the above charge as amended at the conclusion of the case for the prosecution, and acquitted and discharged him accordingly. In conclusion it must be noted in this particular case that the accused was, in the amended charge, charged for possession only and not for custody or control of the drugs in question. I would also add, in fairness to the prosecution, that it did not make another application to amend the charge a second time at the end of the case for the defence, which application, I would, in any case, have refused.

Accused acquitted and discharged.

Solicitors: *Jag-Jit Singh & Co.; C.V. Prabhakaran & Co.*

PUBLIC PROSECUTOR v. VIJAYA RAJ

[A.Cr.J. (Wan Yahya J.) May 15, 1980]
[Malacca — Criminal Appeal No. 37 of 1978]

Criminal Law and Procedure — Charge of misappropriation of school funds — Acquittal and discharge by lower court — Appeal — Duty of Court of Appeal.

Criminal Law and Procedure — Appeal filed out of time — Whether court competent to hear appeal — Criminal Procedure Code (F.M.S. Cap. 6), s. 307(1)(ix).

This is an appeal against the decision of the lower court in acquitting the respondent, a former headmaster of three charges of misappropriation of school funds. The respondent's duty as ex officio Secretary to the Board of managers of the school was to maintain account books, collect moneys and issue cheques on behalf of the school. With the implicit trust of the chairman of the Board, he had complete control over the financial affairs of the school.

As regards the first two charges, it was proved by the prosecution that the respondent had issued two cheques for $127.77 and $225.00 respectively unaccompanied by any voucher. The cheques for $127.77 was paid to Wearne Brothers as monthly instalments towards the hire-purchase of his wife' car.

A third cheque for the sum of $1,964.00 filled up in the respondent's own handwriting and endorsed by the chairman constituted the subject matter of the third charge.

The respondent was acquitted on the first two charges at the close of the prosecution case on July 15, 1978. Defence was called in respect of the third charge only, on which he was finally acquitted on November 6, 1978. The appellant filed an appeal on November 14, 1978 on all the charges.

Held: (1) the discretion for intervention would only be proper on an application by the person debarred from appealing. As no such applications had been made in this case, the court could not overlook the strict formalities and requirements laid down under section 307(1)(ix) of the Criminal Procedure Code. Both appeals were therefore incompetent;

(2) on the whole, the learned President in this case had failed to take proper consideration of facts which were immensely material towards the determination of the respondent's intention and consequently, the prosecution's case. Had he weighed the evidence he would have arrived at a different conclusion entirely;

(3) it is the duty of the court on appeal to review all evidence presented before the lower court and, if it feels that certain material facts have been missed or improperly considered by the presiding President or magistrate, than it should not hesitate from performing its duty as a judge of facts to consider and weigh those facts and decide whether those facts could have altered their judgment in one way or other;

(4) the order of acquittal in respect of the third charge should be set aside and substituted with that of conviction.